BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming	CS Docket No. 95-61

REPLY COMMENTS OF TIME WARNER CABLE

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July 28, 1995

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Summary

Time Warner Cable ("TWC"), a division of Time Warner Entertainment Company, L.P. ("TWE"), which operates cable television systems throughout the country, submits these Reply Comments in response to the Commission's Notice of Inquiry in this proceeding. 1/ TWC submits the following points:

- Liberty Cable Company, which has attacked TWC and the Commission in its Comments in this proceeding, has committed serious misconduct by violating state and federal cable laws and regulations and by misleading the Commission.
- Liberty has admitted to operating an unfranchised cable system in New York City, in violation of both New York and federal law.
- Liberty has misled the Commission by misrepresenting its New York City cable system as a SMATV system in its OFS applications.
- Liberty has violated Commission regulations by operating at least 15 microwave stations without prior Commission authorization, in some cases even before applying for such authorization, and has then misrepresented material facts to the

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1/ The majority partner of TWE is Time Warner Inc.

Commission in its attempt to explain its unlicensed operation.

- Liberty's claims that TWC has engaged in anticompetitive conduct are baseless, as we demonstrate herein.
- Liberty's claims that the Commission's rules are "meaningless" and that the Commission is guilty of "waste", "delay" and other misconduct are unsupportable.
- The proposals of the Wireless Cable Association concerning uniform pricing and the scope of the private cable exemption should be rejected.
- The proposals of Liberty and the Wireless Cable Association concerning home wiring issues are unwarranted and should be rejected by the Commission.

Introduction

In response to the NOI, the Commission has received numerous comments containing a large body of data concerning the issues raised in the NOI. The comments submitted by Liberty Cable Company, Inc. ("Liberty"), however, have little to do with the issues relevant here. Instead, Liberty has used its Comments in this docket as a vehicle to attack TWC--and the Commission--on a variety of issues, many of which are the subject of unrelated proceedings before the Commission and other authorities. Liberty's Comments are replete with baseless charges that TWC has engaged in "anticompetitive" practices and other wrongdoing. Similarly, Liberty engages in an absurd political diatribe against the Commission, accusing it of delays, procrastination, equivocation and other malfeasance.

Although the issues Liberty raises have been covered extensively in other dockets, we believe it is necessary to set the record straight by refuting Liberty's charges, and informing the Commission of Liberty's serious misconduct. As we discuss in detail herein, Liberty has admittedly violated the law for substantial periods of time by operating an illegal unfranchised cable system in New York City, has misrepresented its business operations in OFS applications submitted to the Commission, has admittedly operated at least 15 microwave stations without first

obtaining Commission authorization for such operation, has made various misrepresentations of fact to the Commission in its feeble attempts at explaining away its unlicensed operation and has continued to operate without Commission authorization.

Liberty's attacks on Time Warner's business practices are all demonstrably false. Liberty's accusations are baseless, and its requests for relief from the Commission are transparent attempts to gain unwarranted competitive advantages over TWC and other cable operators. The Commission should carefully consider Liberty's misconduct in evaluating Liberty's Comments in response to the NOI. Moreover, the Commission should not overlook the outrageously irresponsible nature of the charges contained in Liberty's Comments in its future dealings with Liberty, its management and its attorneys.

I. LIBERTY HAS VIOLATED FEDERAL AND STATE LAW BY KNOWINGLY OPERATING AN UNFRANCHISED CABLE SYSTEM.

Liberty represents itself as an SMATV operator. However, Liberty in fact is currently operating a cable system in New York City without a franchise. Liberty has attempted to avoid detection of its illegal activities, has brought baseless litigation seeking to prevent the New York State and New York City authorities from enforcing the

franchise requirement, and generally has done everything in its power to avoid its obligation to obtain a franchise for its cable system. Thus, although Liberty has attacked TWC with a shotgun blast of outrageous charges of "anticompetitive" conduct, it is Liberty that has broken the law and competed unfairly with TWC.

Since at least January 1993, Liberty has operated a cable system in New York City. Not content to operate SMATV systems in New York apartment buildings--which it has represented to the Commission is the nature of its business--Liberty has connected buildings by coaxial cable that are not commonly owned, managed or controlled, thereby triggering the franchise requirements of 47 U.S.C. Section 541(b) and N.Y. Exec. Law Art. 28, Section 819(1). Liberty successfully concealed the nature of its operations for more than a year. Liberty was forced to answer for its violation of the franchise obligation only after TWC discovered that Liberty was operating an unfranchised cable system and reported that fact to the New York State Commission on Cable Television.

In August 1994, the New York State Commission issued an Order to Show Cause to Liberty, requiring it to

respond concerning its unfranchised operations. 2/ Liberty ultimately admitted that it was operating a cable system without a franchise. Following that admission, the New York State Commission in December 1994 entered a Standstill Order that prohibited Liberty from interconnecting by wire any additional buildings that are not commonly owned, managed or controlled, but permitted Liberty to continue its unfranchised operations and provided Liberty an opportunity to defend its actions and apply for a franchise.

By flouting its legal obligation to obtain a franchise for its cable system, Liberty has avoided providing services TWC provides pursuant to its franchise. Thus, unlike TWC, Liberty does not provide universal service, public and governmental access or state-of-the-art cable service; unlike TWC, Liberty is not required to meet stringent technical, construction and customer service standards; unlike TWC, Liberty does not pay franchise fees or make multimillion dollar payments for public and government access studios, City institutional networks, or public access operating support. 3/ Liberty "cherry picks"

2/ In the Matter of Petition of Time Warner Cable of New York City and Paragon Cable Manhattan Regarding the Operations of Liberty Cable Company, Inc., Dock. No. 90460, released Aug. 23, 1994.

3/ TWC's New York City franchise fees for 1994 approached $25 million.

or "cream skims", targeting only select affluent areas in Manhattan and ignoring the vast majority of New York City residents. In contrast, TWC is required by law to serve all residents in its franchise areas. Only by ignoring its obligation to carry such programming as public and government access can Liberty claim that it offers more diverse or desirable programming than TWC. It is grossly unfair for Liberty to be able to compete against TWC in such a manner.

Despite its knowledge that it was illegally operating a "cable system" within the Communications Act for at least a year, Liberty did not make any effort to obtain a franchise for its cable system until October 1994--after it was caught violating the law. Even then, rather than seriously pursue an application for a franchise, Liberty brought a federal court action to enjoin the New York authorities from enforcing, as to Liberty, the franchise requirement. In that litigation, Liberty challenged the basic requirement that it obtain a franchise--thus challenging a fundamental premise of government regulation of cable television. 4/ The United States intervened in

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4/ Liberty Cable Company, Inc., et al. v. Balzano, et al., 94 Civ. 8886 (LAP). Liberty took that position despite the fact that it had earlier supported the constitutionality of the franchise requirement as applied to cable operators such as itself. See Ex parte presentation of Liberty Cable

that action for the purpose of defending the provisions of the Communications Act challenged by Liberty. TWC also intervened, because of the implications of Liberty's effort to obtain the right to operate an unfranchised cable system.

The United States District Court for the Southern District of New York dismissed most of Liberty's claims and denied Liberty's request for a preliminary injunction in an exhaustive and carefully reasoned opinion on March 13, 1995. The United States Court of Appeals for the Second Circuit affirmed on the basis of the District Court's opinion on July 12, 1995. (Copies of the opinions of the District Court and the Court of Appeals are attached as Exhibits A and B.)

II. LIBERTY'S ATTACKS ON TWC AND THE COMMISSION ARE BASELESS.

Liberty's Comments in response to the NOI consist entirely of unsupportable attacks on TWC and the Commission. We find Liberty's Comments disturbing, both in their offensiveness and their misstatements of fact.

Company, Inc., submitted by W. James McNaughton, Esq. to Ms. Donna R. Searcy, April 7, 1992.

A. TWC's Petitions to Deny Liberty's 18 GHZ Applications Did Not Abuse Commission Procedures.

Liberty claims that TWC has abused the Commission's processes, and hindered Liberty's ability to provide competition and expand its service in New York City, by petitioning to deny certain of Liberty's OFS applications to add new paths and requests for Special Temporary Authority ("STA") to operate those unlicensed paths in the meantime. Liberty Comments at 6-8, 15-16. Liberty's Comments assert that "regardless of Liberty's culpability" for rule violations, TWC has been able to "game" the Commission's processes to "take advantage of" Liberty's violations. Id. at 15. Liberty proposes that the Commission adopt policies like those previously proposed to Congress, pursuant to which OFS applications would no longer be subject to a 30-day public notice period, but only to petitions for reconsideration after the fact of a grant. TWC submits that Liberty's own statutory and rule violations amply demonstrate the wisdom of the present procedure.

In an act of unmitigated gall, Liberty suggests that it was somehow improper for TWC to bring Liberty's substantial violations of the law to the Commission's attention--but not improper for Liberty to commit them. Among other violations, TWC made the Commission aware of the

fact that Liberty has interconnected with hardwire, and is providing cable service to, buildings in New York City that are not under common ownership, management, or control without a franchise. As noted above, under the Communications Act, as interpreted by the Commission, such facilities constitute a "cable system" requiring a franchise. 5/ Liberty has filed OFS applications proposing some of these same buildings as transmit and receive sites, but falsely represented in those applications that it was a private cable/SMATV operator seeking to provide private cable service. Although Liberty seeks to excuse this inconsistency as "inadvertence", it is obvious that Liberty has engaged in an attempt to mislead the Commission, because Liberty well knew it was operating a cable system without a franchise. Thus, TWC has requested that Liberty's applications be conditioned on Liberty submitting a

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5/ 47 U.S.C. §§ 522(7), 541(b)(1). See also Report and Order in PR Docket No. 90-5, 67 FCC Rcd 1270, 1272 (1991). The fact that Liberty challenged these provisions in court obviously did not invalidate them or excuse Liberty's noncompliance in the meantime, as Liberty implies. In any event, as noted above, Liberty's challenge failed in both the district court and court of appeals. Although TWC has challenged various pieces of cable legislation and regulation, it has complied with such requirements during the pendency of its challenges and abided by the decisions thereon. Liberty, however, has simply flouted the provisions at issue in its baseless claims--which have now been soundly rejected.

comprehensive plan to cure its franchise violations and ensure no future violations would occur.

TWC also has brought to the Commission's attention the fact that Liberty was illegally operating unlicensed OFS facilities without any prior FCC authorization. In response, Liberty was forced to admit that it was operating no fewer that 15 OFS receive sites without any authorization. Once again, without TWC's petition, the Commission would be unaware of a significant violation by Liberty. Liberty claims TWC's opposition to its STA requests has hurt its ability to provide service. What has hurt Liberty, however, is its own willful failure to comply with the law by making timely applications for all necessary permits. Moreover, Liberty has simply ignored its legal obligations and operated its cable system without authorization--even after it was caught in violation of the law. Thus, Liberty is already providing OFS service to a number of the same paths for which it has sought STAs, without authority, and continues to be allowed to operate these unlicensed facilities even after Liberty's illegal operations have been exposed. Moreover, as TWC has shown the Commission, Liberty sought STAs for the paths it was operating without revealing its unauthorized operations to

the Commission, before TWC uncovered such operations. Thus, it is Liberty that has "gamed" the Commission's processes.

It was not anticompetitive for TWC to request that its competitor be required to comply with the same statutory requirements and rules that apply to it and all FCC licensees. What is anticompetitive is for Liberty to violate those laws in order to avoid burdensome requirements that are borne by its competitor, TWC. Indeed, the Commission's processes rely heavily on competitors such as TWC to bring information concerning possible violations to its attention. 6/ The statutory public notice period allows the Commission to consider such evidence before granting new authorizations. The Commission may thus deny an authorization without any interruption of service to subscribers. In contrast, the procedure proposed by Liberty would facilitate the ability of willful violators to avoid the Commission's requirements. Thus, under Liberty's proposal, an applicant that was later shown to be unqualified would have already commenced service, and would argue that the Commission could not then order it to cease operations without harming existing subscribers. Indeed,

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6/ See Faulkner Radio, Inc. v. FCC, 557 F.2d 866, 875 n.66 (D.C. Cir. 1977), and cases cited therein (competitors have been granted standing to file petitions to deny because they might be the only ones sufficiently interested to do so).

Liberty has made just this argument in support of STAs to cover its unlicensed operations. If anything, Liberty's actions demonstrate the wisdom of the current process (assuming that an OFS applicant abides by that process).

B. Liberty's Other Charges of Anticompetitive Conduct Are Demonstrably False.

The bulk of Liberty's Comments in response to the NOI is a series of unsubstantiated allegations of wrongdoing by TWC. We refute each of these allegations below. Liberty's real complaint is that TWC competes vigorously with it.

1. TWC has not interfered with Liberty's access to property.

Liberty claims that "Time Warner is generally and completely uncooperative in effectuating the connection of Liberty's service and the disconnection of Time Warner's service." Liberty Comments at 9. Liberty offers no support for that allegation. If anything, TWC has made every effort to accommodate Liberty, notwithstanding Liberty's consistent pattern of engaging in unauthorized practices.

Liberty has led prospective customers to believe that once they have informed Liberty of a desire to discontinue TWC service, Liberty has the right to "remove your old Time Warner converter boxes, disconnect your service, and issue you a converter receipt". As a result,

Liberty employees have unilaterally disconnected and collected TWC equipment without prior notice to TWC from the customer (or Liberty) that the customer wants to cease TWC service. In some instances, Liberty has failed even to return such property to TWC. Liberty has no authority to act as a self-appointed agent on behalf of TWC to disconnect TWC service and collect its equipment. Nonetheless, as an accommodation, TWC has in some cases permitted Liberty to collect its equipment.

Apparently, Liberty's real complaint is that TWC attempts to truthfully inform its customers that they have the right to continue to receive TWC's cable service if they choose to do so. Even though Liberty attempts to prevent customers from receiving TWC's service through purportedly exclusive contracts with apartment buildings, New York law gives TWC the right to serve those buildings. 7/ TWC's efforts to inform its customers of their rights are obviously prudent and appropriate.

Similarly, Liberty's complaints about mandatory access provisions, such as N. Y. Exec. Law Art. 28, Section 828, which provides access to franchised cable operators (see Liberty Comments at 21-22), demonstrate that

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7/ See N.Y. Exec. Law Art. 28, § 828; Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982).

the last thing Liberty wants is a level playing field. Although Liberty wants to have mandatory access to all MDUs, it objects to the requirement that it obtain a franchise, which would require it to serve all of the homes in a franchise area and comply with a host of other franchise requirements that have important public interest benefits, but are often costly. The right to mandatory access has been conferred on franchised cable operators in return for their acceptance of certain public interest obligations, such as the requirement to provide universal service. Liberty seeks special treatment--mandatory access without the concomitant public interest obligations--in order to gain an unfair competitive advantage over other cable operators without any commensurate benefit to consumers.

2. TWC's bulk rates are not "predatory".

Contrary to Liberty's baseless charges, TWC's bulk rates are not "predatory" or "designed to eliminate Liberty from the marketplace", nor do they "circumvent" the Commission's rules--TWC is in full compliance with those rules. See Liberty Comments at 9-10. Liberty, however, has avoided complying with those same rules by violating its legal obligation to obtain a franchise.

TWC's New York City bulk rates have been approved by city and state authorities, which are responsible for

promoting competition. TWC is required to offer its bulk rates to all buildings in its franchise areas with 15 or more units and has submitted certifications to the City that it has done so. TWC has also been required to demonstrate to the City that its rates are cost-justified. Thus, Liberty's accusations that TWC offers bulk rates "only to those MDUs considering switching to Liberty's service", and that TWC's rates are not cost-justified, are sheer fabrication.

Liberty calls the FCC's pricing rules "meaningless", and requests additional "standards", "complaint procedures" and "instructions" concerning bulk rates. Liberty has not demonstrated any need for such measures. The Commission's rules permit competition, and TWC, unlike Liberty, is complying with those rules--as Liberty admits. Once again, Liberty is blatantly seeking a competitive advantage over TWC and other cable operators.

3. TWC has not inappropriately denied Liberty access to its original programming.

Liberty contends that TWC has inappropriately denied it access to Time Warner's New York 1 News service. Liberty does not allege that TWC has acted unlawfully. TWC is under no legal obligation to sell to competing MVPDs, including Liberty, programming distributed by cable, such as its New York 1 News service. The program-access provisions

of the 1992 Cable Act apply only to satellite-delivered programming.

New York 1 News is a 24-hour news service covering New York City news generally not available on local broadcast channels (because they report news in only a few half-hour segments each day). TWC specifically created New York 1 News to fill a programming void for its New York City subscribers, a service that was launched at great expense, with a capital investment of several million dollars. A number of other cable operators have developed similar local news programming recently, presumably based on TWC's success and customer demand.

Liberty's suggestion that the Commission ask Congress to amend Section 19 of the 1992 Cable Act so that the program access provisions would apply to New York 1 News should be rejected. The proposition that satellite-delivered programming will not be the pre-eminent means of delivering video signals is unrealistic. It is widely believed that national programming distribution, and the economies achieved thereby, cannot be accomplished by any more efficient means that satellite delivery. We are not aware of any new or announced national programming services that are expected to be delivered by means other than satellite.

There can be no doubt that the legislative choice to apply the program-access provision only to satellite-delivered programming vendors was intentional. See S. Rep. No. 92, 102d Cong., 1st Sess. 29 (1991). Whatever the merits of applying the program access rules to satellite delivered programming, Congress undoubtedly recognized that applying those rules to non-satellite delivered programming developed by cable operators would effectively eliminate such programming. 8/ It is not anticompetitive for cable operators like TWC to seek to differentiate their services by developing unique and attractive programming. Indeed, it is an illustration of the skill, foresight and industry the antitrust laws are intended to encourage.

Liberty's argument in favor of a disincentive to program creation is fundamentally at odds with the goal of the 1992 Cable Act--to increase "diversity in the multichannel video programming market"--and with its own claims about the benefits of diversity in advertising that its programming selection represents an alternative to

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8/ The program access rules only apply to cable-affiliated programmers. Cable operators are thus the only distributors denied the ability to have exclusive programming. For example, DirecTv, a DBS operator, has exclusive rights to NFL games, which are unavailable to cable operators. It would be fundamentally unfair to completely deny cable operators the right to distinguish their product from their competitors through limited exclusivity.

TWC's. Liberty has attempted to differentiate its cable service from TWC's by avoiding its obligations to provide such services as public access channels and replacing those channels with other programming. TWC, in contrast, has complied with its ~~legal obligations and developed~~ its own programming at great expense. The Commission should reject Liberty's attempt to exploit not only its own illegal conduct, but TWC's investment and diligence, in order to gain an unfair competitive advantage for itself.

4. TWC has never engaged in "disparaging and false advertising".

Liberty's charges of "disparaging and false advertising" are nothing if not audacious, and Liberty's claim that TWC's statements were "motivated by a malicious intent to undermine Liberty's business" are baseless and offensive. Liberty Comments at 13. There is not a single false or misleading statement in the TWC customer communications attached to Liberty's Comments (Exhs. D & E), or in any other such communication. Indeed, it is surprising that Liberty would submit copies of those letters to the Commission, because--as Liberty recognizes--the factual statements contained in the letters can only lead a reasonable person to doubt Liberty's credibility.

For example, Liberty claims that TWC's letter of June 2, 1995 (Exh. E) about Liberty's illegal activities

"portray[s] Liberty as a company with a complete disregard for the law" (Liberty Comments at 13). Yet the letter simply sets forth facts that Liberty has admitted. It is not surprising that a third party would conclude from those facts that Liberty ~~disregards its legal obligations~~. Apparently, the truth hurts. Liberty argues that "the letter fails to explain the complexity of these matters and the mitigating circumstances involved" (id.). The matters are not complex, and there are no mitigating circumstances: Liberty violated the law, continued to violate the law even after it was caught, and then brought a baseless federal court case in a doomed attempt to justify its actions.

Liberty claims that TWC's statements that Liberty's signal is subject to interference as a result of weather conditions is "patently false". Liberty Comments at 13. Yet the problems with Liberty's type of microwave distribution system, such as rain fade and line-of-sight limitations, are well-known in the industry. TWC's references to those problems are hardly false advertising.

5. TWC's lawsuits against certain MDUs are meritorious.

Liberty claims that TWC commenced "baseless litigation" and "used the judicial process to intimidate potential Liberty customers," with specific reference to six pending cases. Liberty Comments at 13. Liberty makes no

showing that these suits are baseless or constitute any kind of misuse of the judicial process. In fact, each case is meritorious.

All of the cases cited by Liberty involve incidents in which Liberty ~~entered into a purportedly~~ exclusive contract with the building owner and then attempted to take control of TWC's cable television facilities in the building. In some cases that arrangement had the effect of cutting off service to tenants who still wanted to receive TWC's service, as the tenants are entitled to do. Moreover, in each case, when TWC attempted to upgrade its facilities in accordance with its obligations under its franchise and New York law, Liberty relied on its contract with the building to resist, delay and ultimately defeat the installation of such facilities.

In its contracts, Liberty undertakes the defense of the building in any lawsuits concerning its cable service, then designates--and pays for--the lawyer who ostensibly represents the building (but is actually acting on behalf of Liberty). Liberty has never, in its entire corporate existence, offered to pay TWC or Paragon for any of their cable facilities that it unlawfully converts to its own use. TWC has never taken the position that any New York City building owner could not offer, through Liberty or

another company, a competing service to tenants. In the cases cited by Liberty, TWC has not attempted to prevent Liberty from providing service to tenants--rather, TWC has defended itself against Liberty's attempts to prevent TWC from competing against Liberty.

C. Liberty's Request That the Commission "Streamline" Its VDT Procedures Should Be Rejected.

Liberty requests that the Commission's procedures for evaluating video dial tone applications should be "streamlined", on the grounds that they have "hindered the service's growth". Liberty Comments at 20. The procedures Liberty criticizes have little or nothing to do with the declining interest in VDT.

NYNEX recently obtained approval from the Commission to terminate its VDT trial in New York City on September 11, 1995. Liberty had purportedly planned "to use NYNEX's VDT platform in New York City to enhance its competitive posture". Liberty Comments at 19. Liberty itself is a perfect example of why the Commission should carefully examine proposed VDT ventures. As discussed above, Liberty admits that it has illegally operated an unfranchised cable system in New York City, where it sought permission to operate a VDT venture. Further, as TWC informed the Commission during the course of the trial,